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September 3, 2006

Attention: Section 1813 ROW Study
Office of Indian Energy and Economic Development
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VIA ELECTRONIC MAIL (Hard Copy to Follow via U.S. Mail)

**RE: COMMENTS TO SECTION 1813 DRAFT STUDY OF TRIBAL ENERGY
RIGHTS OF WAY**

Dear Sir/Madam:

This letter serves as the Hopi Tribe's comments to the Draft Section 1813 study of energy rights of way on tribal land conducted pursuant to the Energy Policy Act of 2005 and provided for public comment by the Departments of Energy and Interior on August 7, 2006. The original deadline date for the receipt of comments on the Draft 1813 Study as stated in 71 Fed. Reg. 45575 was September 1, 2006, however, during the public and tribal consultation meetings on August 30, 2006, in Albuquerque, New Mexico, the Departments extended the deadline to 10:00 A.M. EST on September 4, 2006. These comments are therefore timely submitted.

The Hopi Tribe originally submitted written comments to the scoping and design of the 1813 Study via Sonosky, Chambers, Sachse, & Endreson on January 20, 2006, provided oral comments during the pre-scoping and scoping meetings held in Denver, Colorado in March and April, and provided additional written comments on May 15,

2006. Finally, these comments to the Draft Study are in addition to the oral comments given by the Hopi Tribe during individual tribal consultations with the Departments of Energy and Interior on August 30, 2006, in Albuquerque, New Mexico.

I. *The Final 1813 Study Report Should Include the Tribal Principles.* In its May 15, 2006, comments to the scoping and design of the 1813 Study, the Hopi Tribe presented a list of ten principles. The trust responsibilities of both the Departments of the Interior and Energy must be used in the composition of the final 1813 Study report and any recommendations or “options” offered therein. The ten principles are a clear expression of the Hopi Tribe’s (and other tribes’) position as what is in its best interests and what recommendations or “options” should be offered by the Departments in the Study, if any. Therefore, it is the position of the Hopi Tribe that these principles should be incorporated and recognized in the final Study report.

II. *Under No Circumstances Should the Recommendations or Options Offered in the Final 1813 Study Report Include any Change to Current Tribal Consent Requirements.* In the Draft 1813 Study, the Departments decline to provide the “recommendations” specifically required by §1813 of the Energy Policy Act of 2005, and instead offer “Options to the Address the Issues,” starting at §4.4 of the Draft Study. These include at §4.4.2 (starting at page 27) some “Options for Consideration by Congress.” Options (d) and (e) of this section offer the option of Congressional changes to federal law that could result in the removal of the rights of all tribes to consent to the use of their lands for any “energy” right of way. Specifically, option (d) offers binding valuation procedures, and option (e) offers federal condemnation of tribal lands without tribal consent. For several reasons, these options must be removed from the final 1813 Study report.

First, the evidence gathered in the Study and the conclusions reached by the Departments based on that evidence provide no support for the extremes represented by options (d) and (e). The nominal reasons stated in support of the need for the 1813 Study to consider changes to the status quo of tribal consent focused primarily on concern over the supposed effect of the tribes’ consent rights on the safe supply of energy in the United States and on the costs of energy to consumers. The Draft Study

shows these concerns to be baseless and without support in the facts and evidence. As an example, at page 15, the Draft Study states, “. . . the Departments have seen no evidence that tribal consent would be an issue in an emergency situation . . . ” and, “. . . the Departments found no evidence that the requirement of tribal consent for obtaining an energy ROW contributed to an emergency situation . . . ” At page 24, the Departments findings are that:

“Although the issue is significant for the parties, **it does not appear to be consequential for the nation or consumers in general** for at least four reasons. First, total energy transportation costs are a small component of overall energy costs . . . Second, the fraction of energy transportation infrastructure that is on tribal lands is also small. Although some tribes require compensation for energy ROWs on their lands in excess of the lands’ market value, the effects are not large enough to have a significant effect on overall energy transportation costs and the total cost of delivered energy paid by consumers . . . Third, apart from price impacts, **there is no evidence to date that any of the difficulties associated with ROW negotiations have led to any adverse impacts on the reliability or security of energy supplies to consumers . . . the effects of any future potential ROW disputes on the reliability or security of energy supplies to consumers are also likely to be small . . .** Fourth, the problem may be essentially self-limiting.” (emphasis added)

Options (d) and (e) of §4.4.2 are presumably offered to satisfy the directive given to the Departments in §1813 of the Energy Policy Act requiring, “the recommendation of appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy ROWs on tribal land . . . ” Although the Departments chose to provide “options” rather than recommendations, they are still constrained by the requirements of the Act that any such options should reflect a “fair and appropriate” method for determining compensation in the grant of tribal rights of way. The options offered at (d) and (e) of §4.4.2, however, are neither “fair” nor “appropriate” methods. In the Draft Study, the Departments conclude that occasional problems arise between tribes and those seeking to use tribal lands for certain energy rights of way in the same manner as may occur in any business transaction between arms-length bargainers. It concludes that those occasional problems do not translate into any danger to national energy supply security or to any significant increase in costs to consumers. It is neither fair nor appropriate, therefore, to offer options that will substantially and detrimentally affect the rights and interests of

every Indian tribe in the country when there is nothing *in the Study itself* to support offering such options. In other words, the Draft Study concludes that the concerns stated by those in support of the removal of tribal consent rights are not supported by the evidence, but offers options in support of those concerns regardless of the lack of any evidence bearing out those concerns. It is imperative that the final Study report rely on facts, not just blind assertions. It is just as imperative that before the final Study report offers any option that would potentially change so many tribes' (as well as their business partners') rights and interests, that any alleged problems be unequivocally proven and supported by those facts.

Second, the Draft Study admits that the scope of the data is limited by the case study approach. Given the limited data scope, the options offered at §4.4.2 (d) and (e) are extreme options disproportionate to the amount of data offered and the conclusions therein. Both options would affect all tribes and all energy rights of way when the data offered provides no insight into such a broad scope of rights, interests, and circumstances.

Third, the options offered at §4.4.2 (d) and (e) would be a reversal of and in direct conflict to numerous existing laws, treaties, and policies regarding the exclusive use rights that tribes have to their lands. As one example, the Hopi Tribe's exclusive use rights to the Hopi Reservation are stated in federal statute at Public Law 93-531, 25 U.S.C.A. §640d *et seq.* Numerous other statutes and treaties provide for the Hopi's and other tribes' exclusive use rights in their homelands and options (d) and (e) directly contradict these recognized exclusive use rights.¹ These options are also contrary to the tribal self-determination statutes and policies that have been the focus of federal Indian policy since at least 1936. *See generally*, January 20, 2006, comments of Hopi Tribe through Sonosky, Chambers, Sachse, & Endreson. In addition, options (d) and (e) directly contradict another part of the Energy Policy Act of 2005, which significantly expanded tribal self-determination by providing for increased tribal control and decreased federal authority over all kinds of energy-related agreements on tribal lands, including energy rights-of-way. Title V of the Act authorizes tribes to enter into Tribal Energy Resources Agreements (TERAs) under which tribes essentially take over federal

¹ It was noted by several tribal representatives at the August 30, 2006, public meeting that tribal treaty rights are not even mentioned in the Draft Report.

approval functions. Once a TERA is in effect, federal approval is no longer required for agreements that are subject to its terms. Options (d) and (e), therefore, contradict the consistent policy choice of Congress towards self-determination of tribes generally, as well as the most recent Congressional recognition of tribal authority to determine how to use their lands for energy rights of way contained in another part of the Energy Policy Act.

Finally, nothing in the Draft Report analyses or considers the *costs* of the offered options. In essence, §4.4.2(d) and (e) provides options that may not only detrimentally effect the rights of all tribes in their lands and contravene at least sixty years of law and policy regarding the treatment of Indian tribes, but will also substantially alter established business relationships and contractual agreements between tribes and their business partners.² The Draft Report offers these options without balancing the equation - *i.e.*, without offering any analysis of the potential results of choosing such options not only to tribal sovereignty per se but to established business relationships and transactions that provide for the development and transportation of significant energy resources in the United States.

It is the position of the Hopi Tribe that there is no problem requiring Congressional action and that position is supported by the Draft Report's conclusions. The Draft Report provides no factual, evidentiary, logical, or legal support for any conclusion, proposal, recommendation, or "option" in the final 1813 Study report that would change a tribe's authority under existing law to consent to rights of way across their lands. Consistent with current law and policy, as well as with the facts found in the Draft Report, such matters should be left to arms length transactions between the tribes and those who seek leave to come onto their lands and use them. The Hopi Tribe is gratified to see many places in the Draft Study in which tribal positions are faithfully stated and tribal concerns recognized. Regardless of this, however, the Draft Study is seriously flawed in its presentation of options providing for the removal of foundational tribal rights in their lands without any support for such options reflected in the Study.

² See Comment No. III below. Nothing in the Draft Report provides any reference to or considers the value added to the energy infrastructure of the United States by the tribes' energy development relationships with industry partners. Likewise, nothing in the Draft Study provides any assessment of the potential costs or losses of that value with a substantial change in the laws and policies underlying those business relationships.

As such, §4.4.2(d) and (e) should not be included in the final Study report.

III. *In the Final §1813 Study Report, the Scoping Issues Should Include the Overall Value Represented in Current Tribal Authority to the Energy Infrastructure.* Starting at §1.3 of the Draft Study, the Departments lists the “common themes” raised during the scoping meetings. Significantly missing from this list of issues is the value added by tribes to the United States’ energy infrastructure that is part and parcel of the requirement of tribal consent for rights of way. Although related to tribal sovereignty, this is a separate issue and accordingly should be recognized separately. The requirement of tribal consent for the use of its lands has resulted in the tribal-led and tribal-approved development of significant energy resources within the United States and eased the distribution of available energy resources to consumers. Several commentators spoke of how tribal involvement in energy development and distribution has led to advances in energy development benefiting millions of Americans, and the need for the Study to adequately consider what tribes have added in terms of energy supply and ease of distribution to the United States’ energy infrastructure. These issues should therefore be reflected in the final Study report.

IV. *The Final §1813 Study Report Should Include More Emphasis on and Consideration of the Uniqueness of Tribal Lands.* The central focus of the §1813 Study is and must be tribal lands. As a result, it is necessary that the final Study report provide more consideration and emphasis than currently offered in the Draft Study on the uniqueness of tribal lands and the ways in which that uniqueness relates to tribal concerns regarding different areas of the Study and the issues raised therein. The uniqueness of tribal lands is cited in the Draft Study only once, on page 10. Given the centrality of tribal lands to every issue considered by the Study, this is unacceptable. There are many parts of the Study where the uniqueness of tribal lands should be given a more dedicated focus. For instance, §4 of the Draft Study starts the discussion of valuation methods for rights of way grants, offering the Federal Land Acquisitions Standards and then listing comments from the parties regarding this valuation method. Although tribal comments are generally listed, there is no mention of the tribal objection to the Federal Land Acquisitions Standards and its use of “all available economic uses” as a

basis for valuation due to the uniqueness of tribal lands and the inadequacy of the economic use standard to measure that uniqueness. As was repeatedly stressed by tribal parties, tribal lands cannot only be measured in terms of economic use. Each tribal land area serves as a homeland for a unique people with a unique culture and history, and that homeland is often the basis of that culture and history. The lands cannot be exchanged for other lands and the lands' uses cannot be reduced to only those characterized as "economic" uses. Measuring value, therefore, only in terms of economic use ignores this fundamental and unique aspect of tribal lands.

The Draft Report generally fails to show adequate understanding of the uniqueness and significance of tribal lands and to translate that understanding into the topics under consideration in the Study, the conclusions reached, and the options offered. The Hopi Tribe has resided in the area that now includes its Reservation for millennia. The Village of Old Oraibi is the longest continuously lived in settlement in what is now the United States. Hopi traditional cultural and religious practices are just as old, and are dependent in large part on their lands. Particular areas of the current Reservation are used only for particular traditional religious and cultural practices, and only certain designated areas can be used for certain practices. Knowledge of a particular cultural use of an area of the Reservation, such as those areas that may be employed for the unique Hopi traditional, cultural, and religious practice of eagle gathering, may be limited to particular clans or groups in order to protect the practice from intrusion by others and to protect the sacredness of the site itself. These unique values of the Hopi's lands are not based on any "economic use" valuation and there is no way to measure the value of these areas in an "economic" or monetary sense. In addition, it is the particularized knowledge of these types of issues held only by the Tribe itself that informs how, when, and under what conditions the Tribe may decide to allow others to use its lands. The final Study report must show a greater recognition understanding of these central issues.

V. *More Focus and Consideration Within the Final Study Report Must be Given to Several Important Areas.* Generally, there are topics addressed within the Draft Report the impact of which is muted or underemphasized. In addition, the Draft Report does

not adequately address certain areas and/or avoids drawing conclusions based on the facts and evidence it does contain. It is very important, therefore, that the final Study report and its executive summary adequately address relevant issues, draw necessary conclusions based on the available evidence and facts, and emphasize important findings and conclusions, such as the following:

a. The status quo (tribal consent through arms-length bargaining) does not endanger the safety of energy delivery in the United States or significantly effect consumer energy costs. As discussed in Comment No. II above, the Draft Study makes significant findings regarding the lack of risk to energy supply resulting from current practices regarding tribal consent to rights of way. In addition, the Draft Study shows that the status quo does not add any significant costs to consumer prices for energy. Given the importance of these issues, the final Study report should centrally include these conclusions in the executive summary and provide more of an emphasis in these findings in the text as well as use these findings in the design of the final Study report's recommendations or "options."

b. The majority of negotiations regarding energy rights of way end successfully. Like the conclusion reached in the Draft Report regarding the safety of energy supply and impact on costs, the fact that most of the time tribes and third parties are able to come to mutually satisfactory agreements regarding rights of way is centrally important and yet underemphasized. The final Study report should place this conclusion more centrally and use this conclusion in the design of any final recommendations or "options."

c. Tribes have been historically under-compensated for rights of way across tribal lands. As one of the four required topics of the §1813 Study, the Draft Study contains little if any definitive conclusions regarding the historical practice of compensation to tribes for energy rights of way. The Draft Study's use of the case study approach undoubtedly limited the Study's ability to discern and highlight the dramatic under-compensation to most tribes on many energy rights of way, but even with the evidence offered by the case studies, the historical under-compensation is given little emphasis and no direct conclusions are made on this practice. The final Study report should correct this error.

d. The lack of utility services on tribal lands. The Department of Energy has significant information about the availability of energy to tribal members on tribal lands. See, e.g., <http://www.eia.doe.gov/cneaf/solar.renewables/ilands/toc.html> (April 2000). This availability or the lack thereof is an important part of the total circumstances surrounding historical and current practices of tribes regarding the use of their lands for energy rights way and should therefore be emphasized more within the final Study report. In particular, the disproportionately high numbers of tribal members without access to energy utilities in contrast to the amount of energy resources developed and distributed from tribal lands should be considered.

e. Analysis of the Department of the Interior's ability to carry out the responsibilities currently assigned it regarding rights of way in Indian Country. The past and present role of the Department of the Interior in the process of approving tribal rights of way and setting any compensation therefore is not discussed in the Draft Report. The final Study report must contain such a discussion. Most of the information requested for the Study from the tribes regarding the historical rates of compensation for tribal energy rights of way is information that should have been kept by and available from the Department of the Interior. In fact, it is part of the Department's statutory duty to keep such records. The lack of availability of information from the Department of Interior and/or what the state of the Department's records are in is relevant to the choice of the case study method for the Study, limits the amount of specific information provided in the Study, and is relevant to the consideration of historical compensation rates. This information must be part of the final Study report. In addition, though not specifically assigned to the Department of the Interior, the Draft Study contains two "options" referencing a federal agency being granted certain responsibilities and/or authorities over the valuation of tribal lands or as the final arbiter for authorizing use of and compensation for tribal lands for energy rights of way. The final Study report, assuming it keeps the current set of options (contrary to the position of the Hopi Tribe as stated herein), must clarify to what agency these responsibilities and authorities would be assigned. If it is the Department of the Interior, it stands to reason, that the final Study report should include a fair assessment of the Department's ability to carry out the responsibilities currently assigned it regarding rights of way in Indian Country

before presenting any options that could end up with it gaining more responsibility over tribes' interests.

f. Consideration and analysis of Title V of the Energy Policy Act of 2005. As stated in Comment No. II above, Title V of the Energy Policy Act of 2005 is a national energy transportation policy relating to energy rights of way across tribal lands. This section of the Act, however, is not discussed or analyzed in the Draft Study. The final Study report must contain a discussion of Title V and its relationship to the issues identified in §1813.

VI. *Tribes are Partners in Industry, Governmental Entities, Business Owners & Consumers and the Final 1813 Study Report Should Recognize this Fact.* Section 1813 requires that the Secretaries of the Interior and Energy, "shall consult with Indian tribes, the energy industry, appropriate governmental entities, and affected businesses and consumers." It is important that the Study state that Indian tribes belong to all of the groups that are required to be consulted with. Largely, it is the perception that tribal interests are contrary and separate to the energy industry representatives that drove much of the comments offered by those proclaiming the need for change in the granting and renewal of tribal energy rights of way. The final Study report should reflect that this perception is inaccurate. At the beginning of the Draft Report, the terms "tribal parties" and "industry parties" are used as shorthand to describe groups providing input into the Study. Those it is likely these terms were only used for convenience, over the course of the Draft Report it serves to distinguish between tribal interests and concerns and energy industry interests and concerns as if the two are separate and distinct or even at odds with each other. The final Study report should at least include a footnote at the introduction of the shorthand terms acknowledging that the use of these terms as a convenience is not intended to infer that tribes are separate from the energy industry and that in fact tribes are part of the energy industry – they are business owners, consumers, energy producers, and energy transporters. It is when tribes are viewed as and are therefore able to act as partners with other energy industry representatives that the most advantageous relationships emerge – for the tribes, for the energy industry generally, and therefore for the United States' energy interests. Rather than following along with a limited view of tribes and their relationships and interests,

the final Study report should make clear the multiple roles of tribes in today's economy and how the tribe's freedom to shape their role (reliant in great part on their right as any other land owner to leverage the use of their lands) can dictate success or failure.

As the Hopi Tribe has noted before, the United States' history regarding tribal rights and resources is replete with stories of tribes losing what little they have left to make way for "progress." One of the few precious resources tribes have left is their land and the ability to control its use. Rather than contemplate taking more away from tribes because of the rare but inevitable problems that occur, tribes' ability to control their lands and therefore their futures should be encouraged and facilitated. The final Study report should conclude and emphasize that there no problems found with the current process for the granting and renewal of rights of way on tribal lands requiring or warranting Congressional action.

Sincerely,

s/Cliff Qotsaquahu
Cliff Qotsaquahu
Hopi Tribal Energy Team

XC: Chairman Sidney
Hopi Tribal Council
Scott Canty